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Palement, P.M.

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# Paradox and Legitimacy in Transnational Legal Pluralism

Phillip Paiement\*

Paradoxes have a fatal inclination to reappear.

Niklas Luhmann

## Abstract

This paper analyses the understanding of legitimacy found in the innovative ‘transnational legal pluralism’ research paradigm that Peer Zumbansen establishes in a recent article in *Transnational Legal Theory*. While it was suggested that legitimacy will replace the constitutional paradox of traditional legal thinking, this research provides an adaptation to that claim. After first constructing the unavoidable permanence of legal paradox found in Niklas Luhmann’s and Jacques Derrida’s work, this characteristic of legal paradox is applied to the emerging concepts of input, throughput and output legitimacy that have proven essential for transnational legal regimes. The analysis argues that the legitimacy of transnational law proves to be no less paradoxical than constitutions. As such, building conceptualisations of legitimacy on these principles becomes significantly problematic. Instead, it is suggested that legitimacy should be based on a regime’s ability to scrutinise its own understanding of its embeddedness in society, and as part of that, the grounds on which it selects input about its activities.

## 1. INTRODUCTION

In a recent publication, Peer Zumbansen outlined an emerging research paradigm titled ‘transnational legal pluralism’ (TLP).<sup>1</sup> A shift towards TLP is a necessary step for legal research, which has struggled in its national perspective to adapt to the societal effects of globalisation. This methodological shift, a researcher’s new lens, corresponds to a

\* PhD Researcher in Law, Department of Public Law, Jurisprudence, Legal History, Tilburg University, The Netherlands. Email: P.M.Paiement@uvt.nl.

<sup>1</sup> Peer Zumbansen, ‘Transnational Legal Pluralism’ (2010) 1 *Transnational Legal Theory* 141. Note that he also uses the terms ‘transnational private law’ and ‘global law’ as nearly synonymous with ‘transnational legal pluralism’. This paper will primarily use either ‘TLP’ or ‘transnational law’.

transformed field of study: a transnational legal field is emerging out of necessity from the pressures and crises of globalisation (economically, politically, ecologically, and so forth). With the transition towards TLP, Zumbansen notes the rise of legitimacy claims of unofficial law and institutionalised 'norms' in place of the previous constitutional paradox of law. This new-found legitimacy lies in focusing on the border of the previously distinct law and non-law, re-affirming the embeddedness of innovative legal structures within the highly differentiated and complex sub-systems of society. Instead of dismissing regulatory governance as non-law, this paradigm suggests an inseparability of regulatory governance from legal orders. It widens the perspective of legal research to include regulatory governance and, more importantly, the focus on what is at stake in the distinction between traditional law and its unofficial counterpart. Following from this shift, the legitimacy of regulatory governance arises not out of the authority of constitutional orders, but instead by access, procedural and result-oriented principles that claim to ensure the order's embeddedness in its field of regulation. The sensitivity of transnational law to its field of influence, demonstrated by participation of the 'all-affected', transparency of procedures, and the involvement of experts, secures the legitimacy of the regimes.

This displacing of constitutional authority raises the question of whether a non-paradoxical legitimacy is possible in transnational law, and what is at stake in the conceptualisation of transnational legal legitimacy. It is not so much a disagreement with Zumbansen's TLP model as a further investigation into the consequences of the formulation of legitimacy at the transnational level. From the perspective of systems theory, this paper will examine transnational legitimacy principles in comparison to the fundamental paradox of the legal system. After first reconstructing Zumbansen's argument, this paper goes on to present different understandings of the legal paradox from both a critical systems and a deconstructive perspective to illustrate the importance of law's relationship with its social environment. Following this, an account of the diverse legitimacy formulations of TLP sets the comparison to determine whether such a transition from paradox to legitimacy is possible. Finally, the analysis of the understanding of transnational legitimacy concludes that indeed paradoxes are still present in the current conceptualisations of transnational legal legitimacy. In response, an alternative understanding of legitimacy is suggested, emphasising the need for regimes to self-reflect on the exclusionary effects of their activities.

## 2. THE RISE OF TRANSNATIONAL LEGAL PLURALISM AND ITS LEGITIMACY

In his article entitled 'Transnational Legal Pluralism', Peer Zumbansen establishes a new research agenda under the same name. This is an attempt to revitalise legal research in light of the effects of societal evolution and globalisation, such as increased economic

and social interactions across national borders, the development of global telecommunications, and the diminishing of previous temporal and spatial limitations. As these effects have materialised in society, corresponding governing structures and mechanisms have simultaneously evolved while the paradigms of legal research have remained largely unchanged. Examples of such structures and mechanisms include the World Trade Organization (WTO), the International Organization for Standardization (ISO), regional multilateral trade agreements, and sector-specific quasi-judicial bodies. Though the 'global governance' movement often portrays these changes in the schema of periods 'before' and 'after' globalisation, with their respective shifts from government to governing, nation-state to global, Zumbansen rightfully criticises this depiction for idealising both sides of the distinction, and for neglecting the lengthy tradition of 'legal pluralism'<sup>2</sup> which questioned the conservatism of positive law thinking far before a 'before' and 'after' globalisation schema existed.<sup>3</sup> By applying the tradition of legal pluralism to the contemporary context, Zumbansen builds 'transnational legal pluralism', a second-generation legal pluralism, as a model appropriate for studying legal activities outside of law-state associations in 'a society understood as non-territorially confined, functionally differentiated and constituted by the co-evolution of conflicting societal rationalities'.<sup>4</sup>

In shifting perspectives from state-centred law to transnational law that exists in both state and non-state arenas, as well as across these arenas, the legal-normative fields of TLP require reformulation of the most basic principles of legal research, such as legal validity, the authority of public institutions, territorial sovereignty, and jurisdiction.<sup>5</sup> Consequently, it could be claimed that the adoption of a TLP perspective would result in the loss of the certainty, unity and hierarchy of legal systems.<sup>6</sup> However, Zumbansen correctly notes that this sense of loss is self-inflicted among legal researchers who retain an idealised version of a 'before' globalisation and rely on a strict, state-based conceptual separation between law and non-law. A revitalisation of legal pluralism is necessary to reinvigorate the questioning of the law/non-law division and the reliance placed on it in contemporary legal research which naively concludes that transnational legal regimes are impossible. Instead of the dualism 'more or less state' in lawmaking, a consequence of before/after thinking about globalisation, the important questions that TLP proposes are: 'what is at stake in making references to either?' and 'what is at stake when

2 See for instance: Robert C Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard University Press, 1991); Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global Law Without a State* (Dartmouth, 1997) 3–28; John Griffiths, 'What is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism* 1; Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869; Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Field of Study' (1973) 7 *Law and Society Review* 719.

3 Zumbansen (n 1) 143.

4 *Ibid.*, 147.

5 Teubner (n 2) provides the example of the transformation of legal validity in the form of self-validating contracts found in *lex mercatoria*, an exemplary form of transnational legal pluralism.

6 Zumbansen (n 1) 170–80.

we differentiate between law and non-law?<sup>7</sup> What follows is, first, a short description of Zumbansen's TLP model, which is placed in comparison to two competing accounts of the law/non-law division in legal research. Secondly, an analysis of the treatment of constitutional paradox and legitimacy in the TLP model is provided and the primary question of this article is introduced.

### A. Situating TLP in Legal and Spatial Distinctions

A double movement is necessary to adopt the TLP perspective: first, a collapse of the law/non-law boundary; and second, a collapse of the global/national boundary. These are not so much two separate distinctions as they are the same distinction from two different angles, the former focusing on law and the latter on space. They are rooted in the same distinction between a previous nation-state dominant construct and the post-state construct of societies that TLP requires, which certainly still includes an important role for the state. For the latter of the two distinctions, Zumbansen invokes Saskia Sassen's concept of 'global assemblages' to illustrate how the two spatial categories can be folded onto each other, to 'simultaneously emphasise and relativise the national in the emerging cartography of a globalised world'.<sup>8</sup> Transnational private law, global administrative law, regulatory governance, among the many other forms of transnational law, therefore should not be understood in opposition to, or as challenging, state legal systems, but as co-existent in a heterarchy of law that is defined by 'hybridity and plurality'.<sup>9</sup> And likewise, nation states shouldn't be overlooked by transnational private law, because they continue to be both essential sources and contexts of law, as well as influential in the development of transnational law. The important point to carry forward is that the two spatial categories 'state' and 'global' are not exclusive, nor in opposition, but instead require each other and are situated within each other so that they cannot be thought of outside of the context of the alternative.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, 181. Note that Sassen's focus on the importance of *both* state *and* global is similar to the position of Colin Scott and the 'regulatory capitalism' literature. See for instance: David Levi-Faur and Jacint Jordana, 'Preface: The Making of a New Regulatory Order' (2005) 598 *Annals of the American Academy of Political and Social Science* 6; David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *Annals of the American Academy of Political and Social Science* 12; John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Edward Elgar, 2008); Colin Scott, 'Regulatory Governance and the Challenge of Constitutionalism' in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press, 2010) 15–33. Other recent studies by Fabrizio Cafaggi and Tehila Sagy, likewise, suggest that transnational private regulation coexists with mutual support to and from national legal systems. See Fabrizio Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38 *Journal of Law and Society* 20; Tehila Sagy, 'What's So Private about Private Ordering?' (2011) 45 *Law & Society Review* 923.

<sup>9</sup> Paul Schiff Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155.

The second movement, the collapsing of the legal/non-legal distinction, is perhaps more controversial. An earlier tradition of legal pluralism<sup>10</sup> in the 1970s and 1980s examined the relationship between legal and non-legal normative orders in society, particularly assessing the 'socially responsive, contextualised, and ultimately *learning* mode of legal intervention'.<sup>11</sup> This field studied the multi-normative landscapes of post-colonial societies, evaluating the political dimensions of legal and non-legal regulation of societies, and distinguishing between state legal orders (relics of colonial times) and non-state normative orders such as religious, ethical and tribal norms.<sup>12</sup> As a second generation of legal pluralism, the TLP model posits as its core interest the significance of regulating society with either official state law, or with other alternative, quasi- or non-legal mechanisms. It therefore suggests that transnational legal research must remain open to non-traditional legal forms and the significance of their use in a particular context.

In taking this perspective towards the significance of the distinction between legal and non-legal regulatory forms, Zumbansen situates the TLP perspective in contradistinction to two other competing views on the relationship between law and alternative forms of social ordering. By juxtaposing the TLP perspective with these two competing views, a better description of the former can be provided. First, using systems theory, David Nobles and Richard Schiff suggest maintaining a strict boundary between law and other normative systems in society in order to avoid an irresolvable problem of 'translating' indigenous terms of social normative institutions as 'law' or a different normative form (ethics, religion, norms). Rather than become consumed with this allegedly impossible task, they suggest that a second wave of legal pluralism should instead continue with a strict delimitation between legal communication and other societal communication, even when terminology is inconsistent, or when a system rejects recognition of its own developments.<sup>13</sup> Their position would, however, close the door on what Zumban-

10 See for instance: Ellickson (n 2); Moore (n 2). Note that both authors focus on normative ordering of societies outside of nation-state legal systems, yet still maintain that these normative orderings are important for understanding the operation of the respective state legal systems. Their field of study is on the non-law side of the boundary, but situated in a way that challenges the ontological boundary itself, arguing that the law is much more than the law (legal institution), it is also to some extent the non-law.

11 Peer Zumbansen, 'Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law' (2008) 56 *American Journal of Comparative Law* 769, 776.

12 Peer Zumbansen, 'Law's Knowledge and Law's Effectiveness: Reflections from Legal Sociology and Legal Theory' (2009) 10 *German Law Journal* 417.

13 Richard Nobles and David Schiff, 'Using Systems Theory to Study Legal Pluralism: What Could be Gained?' (2012) 46 *Law & Society Review* 265, 287; Teubner (n 2) 10. Nobles and Schiff note: 'systems theory would start with the observation that the differentiation of law, politics, mass media, religion, and other systems is a feature of modern society, continue by identifying how that differentiation operates, and only then translate the results.' Likewise, Teubner states: 'Legal pluralism is then defined no longer as a set of conflicting social norms but as a multiplicity of diverse communicative processes in a given social field that observe social action under the binary code of legal/illegal.' Lawyers have a history of ignoring developments in the legal system, for instance by resisting recognition of public international law, European Union (EU) legisla-

sen considers to be precisely the strength of the TLP perspective. By opening the door to analysis of experimentation in unofficial law, best practices, codes and standards—‘law’s new texts’<sup>14</sup>—the TLP perspective is able to examine what difference is made in this distinction between law and non-, or unofficial, law.

Secondly, the TLP perspective is set in contrast to the combined impact of a neo-formalist ‘attack on legal regulation’ and a neo-functionalist ‘prioritisation of private ordering over “state intervention”’.<sup>15</sup> The combination of these two traditions is exemplary in the Law & Economics tradition and its focus on the economic analyses of various forms of possible regulation, rather than their political, legal or broader societal consequences.<sup>16</sup> In earlier studies of neo-formalist and neo-functionalist critiques of contract law, Zumbansen observes that claims concerning the ‘efficiency of social norms’ in comparison to state legislation result in the de-politicisation and privatisation of regulatory governance.<sup>17</sup> According to Zumbansen, this neo-liberal conceptualisation requires a dangerous, ‘crude reductionism’ in the ‘distinction between an allegedly neutral private law arena (the *market*) and a value-laden, political realm (the *state*)’.<sup>18</sup> As such, the invocation of preference towards social norms in among neo-formalists and the Law & Economics tradition concerns more than instrumentalism and efficiency; it is also a strategy to isolate governing norms from assessment, and as such is ‘a disregard for processes of negotiation and contestation’.<sup>19</sup> In contradistinction to these normative projects which support greater use of non-legal regulation, Zumbansen’s TLP model focuses in particular on the implicit ‘de-politicisation’, the underlying socio-political conflicts at stake in the decision to regulate a social activity with legal or non-legal mechanisms, as the key concern of transnational legal research.<sup>20</sup>

Viewing the TLP model in relation to these two alternative approaches to understanding the distinction between law and non-law, the emphasis of Zumbansen’s theory is highlighted. Unlike the systems approach to legal pluralism, TLP does not close off analysis to non-traditional, yet possibly legal or quasi-legal, regulatory forms. Additionally, in contrast to the combined position of neo-functionalist and neo-formalists, Zumbansen’s model does not suggest a normative position in relation to legal or alternative forms of regulation, but rather a descriptive analysis of the consequences. To summarise, the purpose of the TLP perspective toward transnational legal research is to

tion, and European Court of Justice (ECJ) rulings within national jurisdictions. The inability of the legal system to identify the totality of legal communications is by no means surprising. In light of this point, the assumption that national courts and other national legal institutions hold a final voice in determining the boundaries of the legal system becomes problematic.

<sup>14</sup> Zumbansen (n 12) 430.

<sup>15</sup> Zumbansen (n 11).

<sup>16</sup> For a seminal work in Law and Economics see Richard Posner, *Economic Analysis of Law* (Kluwer, 2007).

<sup>17</sup> Peer Zumbansen, ‘The Law of Society: Governance through Contract’ (2007) 14 *Indiana Journal of Global Legal Studies* 191.

<sup>18</sup> *Ibid.*, 216.

<sup>19</sup> Zumbansen (n 11) 804–5.

<sup>20</sup> *Ibid.*, 776, 802.

remain open to alternative, non-traditional forms of regulation in order to answer the question ‘what is at stake’ in deciding between the use of official or unofficial norms, and furthermore, ‘what is at stake’ in suggesting that non-traditional regulatory forms are *not* legal tools, that is, not legal techniques. This entails exploration beyond the boundaries of state law into the realms of ‘unofficial law’, industrial standards, codes and best practices, not to establish their ontological status as ‘law’, but rather to examine what the deeper consequences are of using such legal alternatives. It neither claims that all normative forms of regulation are ‘law’, nor does it limit analysis to a formal, state-based notion of law. Instead it delights in the heterogeneity of legal and non-legal regulatory possibilities. With this general account of transnational legal pluralism in hand, it is now possible to examine the treatment of constitutional paradox and legitimacy within the model.

## B. Transitioning from the Paradox of Constitutionality to Legitimacy Principles

An effect of refocusing on legal-normative regimes outside of the nation-state tradition is precisely the ‘loss’ of fundamental legal principles that structure and guide legal research, particularly the constitutional order as the source of law’s legitimacy. From the perspective of TLP, private regulatory systems fill the void where constitutional orders traditionally stand with ‘process-oriented principles’, ‘accountability’ and ‘transparency’, ‘in the struggle over a new foundation of legitimacy’.<sup>21</sup> This is visible, for instance, in the rise of auditing in transnational environmental law regimes like the ISO 14001 certification and sustainable forestry certifications, which primarily regulate the procedures and processes of corporations, and establish substantive requirements concerning stakeholder participation.<sup>22</sup> Not only does the form of legitimacy change from constitutional orders to process principles, but it also shifts from singular to plural, and competitive, as different regulatory regimes try to out-perform each other with their legitimacy claims and external groups raise diverse legitimacy disputes on regulatory regimes. Accordingly, the openness of legal pluralism to ‘unofficial’ legal forms leads to a different distinction between law and environment than that of the constitutional legal orders, and thus also a different understanding of legitimacy. Zumbansen helpfully illustrates that as legal analysis shifts from the national to the global level, legitimacy takes the place of the constitutional paradox, based on the distinction between the law and non-law, its environment.<sup>23</sup> Instead of highlighting fundamental differences between legal and non-legal regulation, the TLP model is oriented toward their ‘reciprocal interdependency’—and

21 Zumbansen (n 1).

22 International Organization for Standardization, ‘ISO 1400—Environmental Management’, [www.iso.org/iso/home/standards/management-standards/iso1400.htm](http://www.iso.org/iso/home/standards/management-standards/iso1400.htm); Forest Stewardship Council, ‘Forest Stewardship Council—International Center’, <http://ic.fsc.org>.

23 Zumbansen provides a conceptual chart depicting examples of both law and non-law at both national and global levels, and the subsequent locations of (constitutional) paradox and legitimacy. See Zumbansen (n 1) 179.



this appears to be the conceptual location of the legitimacy of transnational regimes and their normative orders.<sup>24</sup>

Unfortunately, a more thorough description of the transition from the tradition of constitutionality (and its paradox) to legitimacy in transnational law is not provided by Zumbansen. It is stated that legitimacy of transnational law concerns the distinction between law and non-law and is accounted for by a plurality of competing 'process-oriented principles', but the reader is left without answers as to the *significance* of this transition toward legitimacy principles instead of constitutions. Furthermore, in light of the previously described primary focus of TLP, one has to wonder whether this transition to legitimacy is completely entangled with the question 'what is at stake' in the distinction between law and non-law. Zumbansen notes in his conceptual table that the 'constitutional paradox' is substituted by legitimacy in the transnational context.<sup>25</sup> In suggesting that process-oriented legitimacy principles take the place of constitutional paradox, the question arises as to how the characteristics of this paradox, a phenomenon that is considered by numerous traditions in legal theory to be inescapable, could be transformed into a foundation of legitimacy. More significantly, the question that remains unanswered in Zumbansen's text is whether the legitimacy of transnational legal pluralism faces similar paradoxical issues as the constitutional paradox it replaces. Or, alternatively, is it possible to conceptualise a non-paradoxical legitimacy for use in the TLP perspective? This is the primary question that the current paper pursues in order to provide a more substantial account of legitimacy in transnational law, and thereby further Zumbansen's ambitious TLP model.

In order to answer this question, it is first necessary to provide a description of the foundational, or constitutional, paradox of law from both deconstructive and critical systems theory perspectives in order to extrapolate the inescapable properties of legal

<sup>24</sup> Zumbansen (n 1) 185–6. Note that the term 'legal order' in the context of TLP cannot be understood in the same way that a legal order is understood in nation-state law. TLP regimes will not constitute the sole legal authorities in a given territory or field, and thus cannot be said to create the same kind of legal order that was historically understood in the context of nation-states. In another recent publication Zumbansen gives the following revised TLP definition of 'law': 'the norm-making processes have to be seen as *law generating* when and where we are willing to recognise the inseparability of the coordinative/regulatory dimension from the authority/affectedness dimension of these processes.' Peer Zumbansen, 'Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 *Journal of Law and Society* 50, 70.

<sup>25</sup> Zumbansen (n 1) 179. The constitutional paradox referred to by Zumbansen derives from, among others, Carl Schmitt's and Walter Benjamin's analyses of sovereign authorities and violence in the foundations of legal orders, Jacques Derrida's and Niklas Luhmann's descriptions of the paradoxical implications of such foundations, and Oren Perez and Gunther Teubner's discussion on the ramifications of legal paradoxes and how they are handled. See: Walter Benjamin, *Zur Kritik der Gewalt und andere Aufsätze*, Herbert Marcuse (ed) (Suhrkamp, 1965); Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, George Schwab (trans) (Massachusetts Institute of Technology Press, 1986); Jacques Derrida, 'The Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 920; Niklas Luhmann, *Law as a Social System*, Keith Hawkins (ed) (Oxford University Press, 2004); Oren Perez and Gunther Teubner (eds), *Paradoxes and Inconsistencies in the Law* (Hart Publishing, 2006).

paradox. Afterwards, in section 4, a more detailed account of the process-oriented legitimacy principles that Zumbansen refers to will be provided, allowing for an analysis, in section 5, as to whether these legitimacy principles avoid the issues of constitutional paradox that they replace—that is, whether we can think of them as an improvement—or whether the same issues of paradox return, only in new terminologies.

### 3. LAW'S FUNDAMENTAL PARADOX FROM DECONSTRUCTIVE AND AUTOPOIETIC PERSPECTIVES

If we take as a starting point the suggestion that process-oriented legitimacy principles are to replace constitutional paradoxes in the context of transnational law, it is first necessary to provide an account of the constitutional, or foundational, paradox of law. Niklas Luhmann's systems theory and Jacques Derrida's limited, but influential, deconstructive writings on the 'force of law' have gradually been recognised for their many affinities, despite their many differences.<sup>26</sup> One major affinity the two authors have is precisely their interest in the many paradoxes of law, and more particularly with the foundational paradox of the self-constitution, or self-reference, of law. Below, a short description of this paradox is given from their respective positions. It starts with Luhmann's description of paradoxes, their relevancy from a social systems theory perspective, and constitutions as historical mechanisms for dealing with legal paradoxes. Following that, perspectives shift to the importance of the legal-environmental boundary by examining Derrida's account of the violence in the foundational legal paradox. From the analysis in this section it becomes apparent why the foundational legal paradox is inevitable, and more importantly, that the constitutional authority and legitimacy of law is inevitably a question about accounting for law's relationship with its social surroundings.

#### A. Legal Paradox in Social Systems Theory

In Luhmann's systems theory, paradoxes arise from the self-reference that distinguishes systems from their environments. In this case, law's self-reference distinguishes it from the broader society.<sup>27</sup> The identities of society's autopoietic systems (law, economics, politics, art, science, etc) are constructed in their self-referential operations that con-

<sup>26</sup> Drucilla Cornell, 'Relevance of Time to the Relationship between the Philosophy of the Limit and Systems Theory' (1991–2) 13 *Cardozo Law Review* 1579; Gunther Teubner, 'Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter' in Perez and Teubner (n 25) 41; Andreas Philippopoulos-Mihalopoulos, *Niklas Luhmann: Law, Justice, Society* (Routledge, 2010); Thanos Zartaloudis, 'On Justice' (2011) 22 *Law and Critique* 135.

<sup>27</sup> Andreas Philippopoulos-Mihalopoulos, 'The Successful Failing of Legal Theory' in Amita Dhanda and Archana Parashar (eds), *Decolonisation of Legal Knowledge* (Routledge India, 2009) 51; see also Niklas Luhmann, 'The Third Question: The Creative Use of Paradoxes in Law and Legal History' (1988) 15 *Journal of Law and Society* 153.

stitute a closure—or boundary—between system and its surrounding environment. In the context of the legal system, its system-specific form of operating, with cases, legal argumentation, courts, codes, rights, obligations, etc, in effect creates a language, based on the binary code ‘legal/illegal’, that is uniquely legal, and thereby distinguishes law from other social systems. This self-referential identity is an internal unity—the representation of the system itself, but only in relation to its environmental other, and thereby requiring its environment. Thus, when we discuss the foundational paradox of law, we are certainly concerned with the overarching question of transnational legal pluralism: what is at stake in the distinction between law and non-law, which is here reformulated as law and environment. This is a social environment full of not only economics, finance and aesthetics, but also conflicts, genders, waste and frustrations.

In identifying itself in distinction to its environment, the legal system is continually faced with problems of indeterminacy that arise from paradoxes and tautologies. More specifically this arises when the legal binary code is applied to the system’s unity by the question, ‘is law legal?’ or alternatively, ‘is legality legal?’ and its opposite, ‘is illegality legal?’ The resulting tautology is that ‘legality is legal’ and the paradox that ‘illegality is illegal legality.’<sup>28</sup> The problem, as Luhmann points out, is that when the negation is added (illegality), it can be indeterminately related to either the acts of law, or to the law itself.<sup>29</sup> The legal paradox illustrates the fundamental difficulty of answering the question ‘whether it is legal or illegal to distinguish between legal and illegal.’<sup>30</sup> In positing the unity of the two sides of the distinction legal/illegal, the above question can no longer be asked. To be brief, the impact of this indeterminacy is that the legal system cannot provide a stable account of the system’s own legal status. If the system is capable of denouncing certain activities as illegal, such as the dumping of waste or wage discrimination based on gender, it opens the possibility that the legal system itself, the simple use of legal language, can be deemed illegal.

Although self-referential, and tautological, the account of paradoxes in systems theory is inseparable from the relationship between systems and their environments. Paradoxes introduce skepticism about a system’s self-referential closure to its environment, about whether this closure can be accounted for in the only language accessible for the system. In the legal context this manifests in the uncertainty as to whether legal treatment of issues—the use of law—is legally acceptable. According to Luhmann, systems are able to approach such instances as opportunities for further self-referential evolution,

28 See Pablo Holmes’s description of the close relationship between tautologies and paradoxes in systems theory. For the purposes of this paper they will be considered as functionally synonymous. Pablo Holmes, ‘The Rhetoric of “Legal Fragmentation” and its Discontents: Evolutionary Dilemmas in the Constitutional Semantics of Global Law’ (2011) 7(2) *Utrecht Law Review* 113; see also Luhmann (n 25) 185.

29 Niklas Luhmann, *Social Systems*, John Bednars, Jr and Dirk Baecker (trans) (Stanford University Press, 1995) 33.

30 This is the application of the legal code onto its initial self-reference in the form of the constitutional meta-norms. Luhmann (n 25) 191.

solving the complexity of a paradox by developing greater systemic complexity.<sup>31</sup> In this sense, paradoxes are neither 'bad' nor 'good', neither problems nor solutions. They have functions in that paradoxes and contradictions hold meaning, and this meaning is necessary for systems to attain self-referential closure and to evolve. As paradoxes provide opportunities, systems must rise to the occasion by using their own 'de-paradoxification' strategies,<sup>32</sup> resulting in a better-developed system and the return to business as usual. In any case, systems theory suggests that dealing with paradoxes equates to avoiding discussions about law's environment—it is literally a *system's* perspective on paradox—and the foundational discussions about law's identity as an autopoietic system.<sup>33</sup>

Historically, constitutions and meta-norms have been solutions to this fundamental legal paradox. According to Luhmann, constitutions provide the structural coupling link between political and legal systems, in that 'the constitution provides political solutions for the problem of the self-reference of the legal system and legal solutions for the problem of the self-reference of the political system'.<sup>34</sup> These systems are bound via constitutions because in doing so they produce solutions to their respective fundamental paradoxes, by channeling the problems of indeterminacy into the other system. The legal importance of the constitution is that it 'hides' the fundamental paradox of whether the constitution is itself legal by instead dealing the question to the political system, to be determined politically, just as the political paradox is dealt to the legal system.<sup>35</sup> Thus, from a systems perspective, constitutions are an example of how systems can self-referentially provide solutions to the paradox that lies at the core of their identity as systems independent from their environment. However, constitutions are historically contingent solutions, and as more transnational legal forms develop, alternative solutions for dealing with the paradox of legal legitimacy are arising, such as the proceduralisation of law, which no longer requires a constitutional coupling to politics.<sup>36</sup>

This systems-theoretical approach to law's foundational paradox has the disadvantage of being particularly system-oriented, however.<sup>37</sup> While the interaction between paradox and de-paradoxification strategies is important, this focus skips over the significance of the law's social environment in its foundation. Jacques Derrida's deconstructive approach follows the opposite path by examining the consequences of law's foundation,

31 Luhmann (n 29) 33.

32 See Teubner (n 26). Philippopoulos-Mihalopoulos (n 27) 99–104 describes the hiding of a system's paradox as a process of 'dealing with' by 'dealing it' (away), never forcing itself to face its unutterable paradox.

33 This avoidance is not cunning, sneaky or malevolent, that is, it's not abnormal behaviour. It is indistinguishable from systems operation; it *is* systems operation according to Luhmann's systems theory.

34 Luhmann (n 25) 410.

35 *Ibid.*, 407–9.

36 *Ibid.*, 364–5.

37 Andreas Philippopoulos-Mihalopoulos, 'Critical Autopoiesis: The Environment of the Law' in Ubaldus de Vries and Lyana Francot (eds), *Law's Environment: Critical Legal Perspectives* (Eleven International Publishing, 2011) 45.

its identity. Through his analysis we can better grasp the significance of the paradox that develops from law's boundary with its environment.

## B. Emphasising Law's Environment in its Foundational Paradox

In his discussion of Walter Benjamin's *Zur Kritik der Gewalt*,<sup>38</sup> Derrida studies the authority of law in the context of the constitutional moment. Here he argues that the constitution of a legal order, the constituting violence,<sup>39</sup> is neither legal nor illegal; instead, it precedes legality. 'This moment of law is, in law, an instance of non-law. But it is also the whole history of law. *This moment always takes place and never takes place in a presence.*'<sup>40</sup> He depicts a legal order that is founded upon a force or violence (*Gewalt*), which cannot be understood legally. This is to say, a legal regime is founded on a moment, often called constitutional, from which the distinction between legal and illegal originates, but which cannot be retrospectively assessed using this distinction. Law's foundation, its paradox, cannot be registered legally as its origins are found in its environment; the original violence becomes foreign. The constitution of a legal regime is the end of the search for meta-norms, and to look beyond it for norms to assess the legality of a constitution is impossible.

The reunion of the constituting and preserving violence presents a tautological dilemma.<sup>41</sup> Derrida poses the question, 'but isn't tautology the phenomenal structure of a certain violence in the law that lays itself down, by decreeing to be violent, this time in the sense of an outlaw, anyone who does not recognise it?'<sup>42</sup> The tautology claims to *legitimately* use violence/force to place *illegitimate* violence/force on the negative side of the legal form—to 'outlaw' it, or make it illegal, not a-legal. Violence is then present on both sides of the law, as well as in its a-legal origin, and the tautology is only solved when violence is assessed for its legitimacy, that is, when the legality of legal actions is assessed.<sup>43</sup>

This tautology is the space where Derrida's deconstructive analysis finds an opening to problematise the law's claim to legitimacy. With violence revealed within the law, as

<sup>38</sup> Benjamin (n 25).

<sup>39</sup> Derrida's analysis in this text starts from the double meaning of '*Gewalt*', meaning both force and violence, thus both legitimate and illegitimate force: Derrida (n 25) 927. In the first half of the paper Derrida translates '*Gewalt*' as 'force', whereas in the second half, in the context of Benjamin's text, he switches to using 'violence'.

<sup>40</sup> Derrida (n 25) 991 (emphasis in original). Note the similarity between Derrida's 'non-legal' and Lindahl's 'a-legal': Hans Lindahl, 'Boundaries and the Concept of Legal Order' (2011) 2 *Jurisprudence* 73, 91–92.

<sup>41</sup> Derrida is following Benjamin's own observation that the two types of violence were often not so 'heterogeneous' from each other. See Derrida (n 25) 975 fn 4. Particularly exemplary of the blending of constituting and preserving violence are the actions of the police, who simultaneously invent and enforce the law: Derrida (n 25) 1005–7.

<sup>42</sup> Derrida (n 25) 987.

<sup>43</sup> Note that the similarities between these observations on tautologies and paradoxes are those from the systems perspective.

legal, illegal and a-legal, it poses a threat to law from within the distinction itself, because ‘that which threatens law already belongs to it, to the right to law (*droit*), to the origin of law (*droit*)’.<sup>44</sup> The non-legal violence of the constitutional moment comes back to haunt the legal order, and law’s identity as an autopoietic system in society is threatened as its non-legal origins and their extension through the legal system are displayed. There is a continual possibility that the legal order could always be otherwise, and that the transformation to another legal order can be legally established within the structure of the initial order.<sup>45</sup> Hans Lindahl states similarly that,

Unless it is registered in terms of the legality/illegality distinction, a-legality could not even begin to contest how a legal order draws that distinction. In this sense, a-legal behavior is never only outside a legal order: it is also always to a lesser extent *inside* it—literally and figuratively.<sup>46</sup>

Through this tautology, and its corresponding paradox, Derrida’s deconstructive analysis illustrates the magnitude of what is at stake in pressing the details of law’s identity as a self-referential system. It illustrates the extent to which law’s a-legal environment is violently present within a legal system, in both origin and every preserving action, presenting an ever-present threat to reveal the foreign foundations of law.

It would be appropriate to conclude, as Andreas Philippopoulos-Mihalopoulos does, that the system’s self-description—its account of its boundary, and thus its fundamental paradox—cannot ever permanently do away with its paradox, that it is ‘always gaping, always unachieved, and always toward completion’.<sup>47</sup> This further entails that the system-environment boundary is always incomplete. More dramatically, the environment, with all of the fragmentation, conflicting rationalities, antagonism and differences that society holds, remains within the system, at its origin, its identity, and its authority. The legal system has used constitutions in the past as ‘de-paradoxification’ strategies to hide the

<sup>44</sup> Derrida (n 25) 989.

<sup>45</sup> Here Derrida gives the example of the revolutionary movements that can arise from the legally recognised ‘right to strike’. Or from Lindahl’s perspective: ‘a-legal behavior (also) intimates *another* legal order. More precisely, the *autoréduction* evokes a *strange* legal order’: Lindahl (n 40) 91. Note that Lindahl’s account of paradox focuses on what this paper considers political paradoxes (of representation and constituent power), rather than a specifically legal paradox. Despite this difference, there are numerous similarities and axes of comparison.

<sup>46</sup> *Ibid.*, 92. Though this excerpt demonstrates an affinity with the account of legal paradox given in this paper, Lindahl’s account of legal and political paradoxes is built upon the concept of first-person plural *ipse* identity, and is thereby considerably divergent from the present account. This provides for a predominantly political perspective of paradox, whereas the current analysis is predominantly legal.

<sup>47</sup> Philippopoulos-Mihalopoulos (n 27) 59; or for another take, note the closing lines of Gunther Teubner’s article on the paradox of law’s self-reference: ‘function differentiation of social systems, likewise serves as a repression-mechanism making invisible the fundamental paradox. As with any repression mechanism the repressed paradox of law continually returns by a back door: “And God laughed ...”’: Gunther Teubner, “And God Laughed ...”: Indeterminacy, Self-Reference and Paradox in Law’ (2011) 12 *German Law Journal* 316, 406.

social environment that is at the core of law, but as we transition to transnational legal activities, constitutions lose their utility and new attempts at constructing 'legitimacy' for regimes arise. The questions which follow are twofold: first, from the system's perspective, how do efforts in legitimacy-building in transnational regulatory governance deal with law's foundational paradox? Secondly, is it possible to begin formulating an understanding of legitimacy that doesn't hide this paradox but instead reflects on it? In order to answer these questions, Section 4 will first characterise the legitimacy principles that Zumbansen refers to in the TLP model, after which, in section 5, the paradoxical elements of these principles will be analysed.

#### 4. COMPETING LEGITIMACY SOURCES IN TRANSNATIONAL LEGAL PLURALISM

With its aim to step outside the nation-state paradigm, TLP shifts analysis towards alternative sources of legitimacy aside from the authority of a state's constitutional order. Zumbansen rightfully observes that the discussion of legitimacy originates from the lack of a constitutional order in transnational space. He states:

Instead, process-oriented principles such as accountability and transparency are mobilised and implemented in a vast array of transnational norm creations in order to fill this void. At the heart of such attempts ... is the struggle over a new foundation of legitimacy.<sup>48</sup>

The struggle over legitimacy is described above as the relation between the legal and non-legal activities in transnational spaces. In short, transnational legal regimes require mechanisms to identify their unique 'publics', the audience of their norms and activities. Zumbansen goes further to state that the struggle over legitimacy results in a multiplicity of 'competing attempts' to establish legitimacy, which is substantially different from the traditional understanding of legitimacy arising solely from the authority of a state.

Aside from these brief characterisations, the concept of legitimacy is left largely untouched. The reader is left to wonder where these legitimacy principles come from, how they are used by regimes, and what it means for them to be 'competing'. In this section, legitimacy, in its transnational context, will be described in more detail by drawing on literature of the legitimacy of transnational regulatory regimes, ultimately drawing a picture of a transition from normative to sociological perspectives on legitimacy, built of input, output and throughput principles, which are used in exchanges between regimes and their audiences to 'construct' their legitimacy. This description is necessary in order to later evaluate how different legitimacy principles are from the constitutional paradoxes they supposedly replace in the TLP model.

<sup>48</sup> Zumbansen (n 1) 184.

## A. Shifting Perspectives from Normative to Sociological Legitimacy

Legitimacy among transnational legal and regulatory regimes is a difficult concept to generalise. The sheer diversity of regimes, regulatory fields, and the various methods of rule creation, implementation and enforcement make it impossible to establish an exhaustive list of possibilities. Instead, this article is concerned with predominant practices, necessarily excluding some possibilities, but under the disclaimer that this is by no means an exhaustive account of the legitimacy of transnational legal pluralism. The following subsections depict a general account of legitimacy that is appropriate for the context of transnational legal and regulatory regimes.

In transnational contexts, the distinction between normative and sociological sources of legitimacy is a fruitful starting point. Buchanan and Keohane state that, 'to say that an institution is legitimate in the normative sense is to assert that it has *the right to rule* ... An institution is legitimate in the sociological sense when it is widely *believed* to have the right to rule.'<sup>49</sup> Their goal, to provide a standard for the normative legitimacy of global or transnational regimes, signals that, until now, these regimes have been dealt with in terms of sociological legitimacy instead. Normative legitimacy was the key understanding of legitimacy in the nation-state context, and though new formulations of normative legitimacy standards are being constructed for the transnational context, sociological legitimacy historically tends to be the predominant approach to viewing legitimacy in the transnational context. For this reason, the present article limits the discussion to a sociological understanding of legitimacy.

In order to make this distinction between sociological and normative legitimacy helpful for present needs, it is first necessary to provide some nuance to the distinction. As Buchanan and Keohane's goal reveals, the distinction between the two understandings is not rigid. Indeed, many efforts are being made to re-conceptualise the legitimacy of transnational or global regimes into normative terms, translating from being 'believed' to have the right to rule to straightforwardly 'having' a right to rule. A helpful variant for this article may be a more skeptical perspective on the use of this distinction, suggesting instead that the distinction is more a difference of perspective than a difference of phenomenon. The determination of which legitimacy is at work depends on one's *position of observation*, the theoretical frame with which one observes, being either internal or external. As such, the difference between normative and sociological accounts of legitimacy is a difference of distance from the regime in question. Sociological accounts of legitimacy are posed externally, from a distance. As such, they are limited to different cognitive possibilities than internal, normative legitimacy accounts. Instead of internal

49 Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & International Affairs* 405. For a description of sociological legitimacy within the context of transnational law, see Jens Steffek, 'Sources of Legitimacy Beyond the State: A View from International Relations' in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, 2004) 82.



validity of norms and consistency with precedent, sociological legitimacy in the transnational context is concerned with a regime's sensitivity to its regulatory environment. This author's reading of the difference between normative and sociological accounts of legitimacy, as difference of perspective rather than difference of phenomenon, then maps well onto Zumbansen's depiction of legitimacy as a connecting concept between law and its non-legal environment.

Given this account of sociological legitimacy as external perspective, what do 'typical' legitimacy disputes and claims look like? Who makes them and how? To state it briefly, normative legitimacy disputes against nation states usually come largely from individuals and civil society organisations, and to a lesser extent from corporations. In the transition to transnational law and its sociological legitimacy, individuals are largely excluded, and legitimacy claims and disputes are instead made by civil society (NGOs, social movements, protest groups), state governments, corporations and industry groups, other transnational legal regimes, and experts (the position in which individuals can still play an influential role). Typical strategies used to dispute a regime's legitimacy include protests, public comparison to other regimes, publication of controversial or damaging documentation, and public denouncement. Examples of legitimacy disputes include the Seattle 1999 protests during the World Trade Organization (WTO) conference, and the public criticism of the Forest Stewardship Council (FSC) by various national forestry industries and the subsequent creation of competing sustainable forestry regimes. These are examples in which the regime itself is perceived as fundamentally illegitimate, an inappropriate normative voice in the particular field. These fundamental disputes of regime legitimacy should be held in contrast to instances in which individuals, or elements, of a regime are individually criticised, while the regime itself is still perceived as legitimate. An example of this latter situation is the recent public comment by former cyclist Greg LeMond (an 'expert' in this case) that he should replace Pat McQuaid as the president of the Union Cycliste Internationale (UCI), a transnational regime that governs the competitive bicycling profession.<sup>50</sup> In this instance, despite LeMond's explicit criticism of the UCI's work under McQuaid, he acknowledges its more fundamental legitimacy as a transnational competitive bicycling regulator in suggesting that he become its president to presumably direct the organisation in a more effective manner. It is important to carry out of this comparison that there is a difference between fundamental disputes that aim at the (il)legitimacy of a regime, and criticism of a regime that still maintains its legitimacy, and that we are concerned with the former.

This brief depiction of legitimacy claims and disputes provides an initial image of the sociological legitimacy of transnational regimes that is characterised in this section, and presumably the understanding of legitimacy that Zumbansen suggests will play an essential role in transnational regimes. In these exchanges between regimes and external

<sup>50</sup> See James Riach, 'Greg LeMond Vows to Challenge Pat McQuaid for UCI Presidency', *The Guardian* (3 December 2012), [www.guardian.co.uk/sport/2012/dec/03/greg-lemond-pat-mcquaid-uci-president](http://www.guardian.co.uk/sport/2012/dec/03/greg-lemond-pat-mcquaid-uci-president).

audiences, a number of principles or standards are invoked, implicitly and explicitly, which can be thought of as the core aspects of a transnational understanding of legitimacy. In order to elaborate on the details of the concept of legitimacy, these principles are addressed next.

## B. Input, Throughput and Output Legitimacy

The indirect democratic principles that are utilised to substantiate legitimacy in the transnational context are frequently grouped into the typology of input, throughput and output principles.<sup>51</sup> These are the different venues in which the aforementioned legitimacy disputes and claims can be made, and reflect different stages in the process of rule creation. In this sense they are principles of 'proceduralisation' which help determine participation possibilities in a regime's operation. Input legitimacy is concerned with the decision-making processes of norm creation, implementation and enforcement. It includes principles and practices such as: public participation, inclusive democratic decision-making, stakeholder involvement, transparency, accountability, and auditing. Through these principles diverse actors seek inclusion in the development and implementation of regulatory norms. An exemplary input legitimacy principle is the 'all-affected' principle, which suggests that all parties to be affected by a regulatory or legal action should be involved in the process of its creation.<sup>52</sup> The reliance on these principles is intended to solve the problem of determining who should be involved in rule creation in order for the process to be considered legitimate.

Output legitimacy, in contrast, is based on the results of a regime's activities, on its substantial contribution, rather than the processes it takes to reach the results. The role of scientific expertise in transnational law and regulation is often justified on the basis of output legitimacy, the belief that their roles will produce better governing of a particular activity. This position requires three assumptions: that there are objectively 'better' and 'worse' solutions to a problem, that experts with knowledge of these solutions exist, and that non-experts are able to identify the experts with this knowledge.<sup>53</sup> Given the com-

<sup>51</sup> Bodansky also includes 'source-based' legitimacy, which derives solely from the source of the norm as is the case in natural law. Due to its irrelevance to transnational legal pluralism, it will be excluded from the current discussion. Input legitimacy can also be considered 'procedural' or 'normative', and output as 'substantive' or 'pragmatic'. Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596; Colin Scott, Fabrizio Cafaggi and Linda Senden, 'The Conceptual and Constitutional Challenge of Transnational Private Regulation' (2011) 38 *Journal of Law and Society* 1.

<sup>52</sup> Jürgen Habermas states that 'the only regulations and ways of acting that can claim legitimacy are those to which all who are possibly affected could assent as participants in rational discourses'. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, William Rehg (trans) (Massachusetts Institute of Technology Press, 1998) 485; see also Regina Kreide, 'The Ambivalence of Juridification: On Legitimate Governance in the International Context' (2009) 2 *Global Justice: Theory Practice Rhetoric* 18.

<sup>53</sup> Bodansky (n 51) 620.

plexity of our current 'risk society',<sup>54</sup> these assumptions—and particularly the first—are quite controversial. In spite of the controversy, experts are still relied on overwhelmingly, also in public institutions, and output legitimacy can be readily competitive as the objectivity of 'best result' is established. Furthermore, Regina Kreide correctly notes that a notion of the 'public' is also required for output legitimacy to be used successfully. The output of expert-led transnational legal measures can only be considered optimal in relation to a set of interests, which are usually considered to be 'public interests'.<sup>55</sup>

Lastly, a third, minor group of legitimacy principles could be called 'throughput' legitimacy. This category is concerned with the processes and procedures by which the rules are made, regardless of who is involved and which results are achieved. The exemplary principle of this group could be 'procedural fairness' and 'impartiality'.<sup>56</sup> Translated into practice, this means that the actors involved in norm creation are given equal voices and roles.

Given this categorisation, it is the author's opinion that the distinctions between input, throughput and output legitimacy shouldn't be considered as being too strict, for they are inescapably intertwined. Firstly, it is clear that expertise cannot provide all the answers, as eventually a decision concerning values, instead of facts, will be required. This can arise in even the most scientific discussions, for example, in the definition of what would constitute a 'danger' to the environment, even what constitutes an 'environment'.<sup>57</sup> Expertise cannot escape the social foundations of science. Secondly, some claim that the optimum output can only be attained if broad inclusive deliberation is used to ensure that the problem is properly understood. Thus, it would seem that output legitimacy would require at least a minimal amount of input legitimacy.<sup>58</sup> Alternatively, it can be argued that a regime of experts is necessarily undemocratic, and thus is mutually exclusive to input legitimacy.<sup>59</sup> Thirdly, the importance of the all-affected principle is diminished if there aren't sufficient throughput principles in place. While it is clear that one can think of legitimacy claims either based on participation, process, or result, it is uncertain how separate these categories are in reality, and the answer is likely dependent on the specific case.

Examining the significance of these categories of legitimacy principles, there is a clear thread which runs through them, namely their adoption of familiar democratic

<sup>54</sup> Ulrich Beck, *World Risk Society* (Polity, 1999). Note that while the characteristics of a 'risk society' make the assumptions controversial, they also perpetuate a greater reliance on experts through the greater awareness of societal risks.

<sup>55</sup> For an example of the relationship between legitimacy and 'public' see Kreide (n 52).

<sup>56</sup> Sigrid Quack, 'Law, Expertise and Legitimacy in Transnational Economic Governance: An Introduction' (2010) 8 *Socio-Economic Review* 3, 7.

<sup>57</sup> Bodansky (n 51) 621.

<sup>58</sup> Gráinne de Búrca, 'Developing Democracy beyond the State' (2008) 46 *Columbia Journal of Transnational Law* 221. A similar position seems to be incorporated in Buchanan and Keohane's 'epistemic-deliberative' legitimacy, in which optimal output legitimacy requires institutional transparency, revisable terms of accountability, and institutionalised contestation and revision. See Buchanan and Keohane (n 49).

<sup>59</sup> 'Expert decision making stands in sharp contrast to public participation.' Bodansky (n 51) 621.

concepts. The participatory nature of input legitimacy strikes a chord with traditional understandings of direct democracy. By including a regime's regulatory audience in its decision-making, it is, in a sense, democratising its operation through the expansion of participatory rights. Output legitimacy, while ignoring the participatory nature of democracy, relies on the identification of a 'public'—as opposed to a private—realm, a set of interests that extend across a community. This allows for experts to speak on behalf of a group, notwithstanding how opaque that group may be. Lastly, throughput legitimacy utilises ideas of formal equality in decision-making and procedural fairness that are identifiable as democratic concepts.

There is a fundamental difference between input and output legitimacy, however, concerning how democratic principles should be linked to legitimacy. A common justification towards output legitimacy lies in the claim that there is not a global *demos* to which a participatory democratic procedural regime could be held accountable, and thus the best option would be to rely instead on experts to provide the best outcome for transnational or global concerns.<sup>60</sup> This position is similar to a skeptical view on the ability to identify a global 'public' sphere, as the identification of a 'public' and 'private' seems to first require an identification of *demos*. However a global *demos* isn't necessary in order to strive to attain democratic principles more fully as a transnational regime.<sup>61</sup> Thus, one could either write off democratic principles, strive to attain them whilst acknowledging the impossibility of a full participatory democracy at the global level, or believe that a global democracy is attainable and ideal, but difficult to realise. For each position a corresponding theory of legitimacy could be built.

To summarise, it is argued here that input, output and throughput legitimacy principles are adaptations of familiar democratic concepts, well known from their use in the nation-state context. They are, perhaps awkwardly, reformulated into a 'comprehensive virtue ethics for institutions',<sup>62</sup> demonstrating the difficulty in shifting paradigms from the national to the transnational context, and illustrating that 'we've got the music and beat of a new legitimacy, but we are still working on the words'.<sup>63</sup> What we are experiencing in the disputing and claiming of legitimacy in the transnational context is an ongoing process of adapting understandings of democracy for new challenges in decision-making. The next section examines how these principles are in turn linked to the identity of a regime as legitimate.

60 Note that some are trying to create foundations for the possibility of speaking of a global *demos*. See especially David Held, 'Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective' (2004) 39 *Government and Opposition* 364.

61 Both Bodansky and Buchanan & Keohane are in favour of output legitimacy over input legitimacy on the basis of the infeasibility of global democratic institutions and the lack of a relevant *demos*. De Búrca provides a substantial overview of this debate, and suggests that 'democratic-striving' is a functional method to overcome the lack of a global *demos*: de Búrca (n 58) 248–56.

62 Oren Perez, 'Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law' (2003) 10(2) *Indiana Journal of Global Legal Studies* 25, 60.

63 T Alexander Aleinikoff, 'Transnational Spaces: Norms and Legitimacy' (2008) 33 *Yale Journal of International Law* 479, 490.

### C. Constructing Legitimacy

While it is clear that a regime's legitimacy is a product of claims and disputes, and that these involve input, output and throughput democratic principles, what remains is the question of how the status of legitimacy is attained. If input and throughput principles are used by a regime, is it automatically believe to be legitimate? Julia Black helpfully suggests that legitimacy must be thought of as 'constructed'. She observes that 'legitimacy claims are thus both constructed and contested by those evaluating regulators ... But regulators, like states, or indeed any organisation, can play a role in constructing their own legitimacy claims.'<sup>64</sup> By publicising organisational and operational information, regimes open themselves up to public scrutiny; by involving civil society organisations in the process of rule development, they build a claim for a more legitimate normative framework; and by incorporating the suggestions of experts, regimes can claim to operate in the interests of an undetermined transnational 'public' and make up for democratic insufficiencies. Through interaction between regime and evaluator the *belief*, among the general society or influential actors, in the legitimacy of the institution is affected, or in other words, its sociological legitimacy is 'constructed and contested'. According to Black, regimes can participate in the construction of their own legitimacy through responding positively to legitimacy disputes, manipulating them, or selectively conforming to those that will in turn support their legitimacy.<sup>65</sup> One could add that they might also respond by criticising the legitimacy of competing regimes.

Accountability plays a key role in this to-ing and fro-ing between regimes, evaluators and broader society. Black defines accountability relationships as 'the means by which legitimacy communities seek to ensure that their legitimacy claims are met, and that their evaluations of the legitimacy of regulators are valid'.<sup>66</sup> As such, accountability functions as a feedback mechanism whereby regimes open themselves to observation by evaluators in order to receive legitimacy-constructing praise, or, as a result of insufficiency, to be told how they could operate more legitimately. Thus, according to Black's theory of legitimacy 'construction', accountability is the key venue through which a regime interacts with its audience, its wider regulatory environment.

In the author's perspective, the mechanism of accountability appears particularly essential in the TLP atmosphere of incompatible and plural forms of legitimacy that regimes are lobbied to align with, whether democratic, effective, expert-based, or otherwise. Without it, regimes would be unable to distinguish between legitimacy disputes and therefore be unable to strategically choose which vision of legitimacy to 'construct' and which to ignore. To provide an example, the ISO issues thousands of rules on products and services in all sectors, and as such has played an essential role in the globalisation of

<sup>64</sup> Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137, 146.

<sup>65</sup> *Ibid*, 146–7.

<sup>66</sup> *Ibid*, 149.

industries. The rule-creation process in the ISO relies solely on experts in the particular field, and therefore offers very few participatory opportunities for a broader global 'demos'. This has not been problematic, however, because its accountability rests largely in the industries it serves, whose interests are well represented by the experts in the rule-creation process.<sup>67</sup> In this way the ISO is able to construct an expertise- or output-based legitimacy.

Given the number of the many incompatible possible constructions of legitimacy, regimes are at risk of being caught in a 'regulatory trilemma'.<sup>68</sup> They are faced with the difficult prospect of making numerous claims that could become contradictory in order to maintain their legitimacy, ultimately resulting in legitimacy claims being ignored, co-opted or destroying precisely what it was that was intended to be made accountable. The plurality of possible sociological legitimacy constructions forces regimes to oscillate between them as they field criticism from different angles (being insufficiently effective, being too secretive and undemocratic, etc).<sup>69</sup> The openness to disputes about legitimacy is a *cognitive* openness to expert opinions and inclusive democratic participation, and its increase in importance, particularly in the field of transnational environmental law, may have led to an excess of cognitive expectations, a point which will be discussed in the following section.<sup>70</sup> Relying on responses from its audience, a regime's legitimacy is less of an award than it is a process of back-and-forth construction and contestation.

This section has provided a description of sociological legitimacy in the transnational context, highlighting the reformulation of democratic concepts into input, output and throughput proceduralisation principles, and the 'constructed' nature of legitimacy identities that are neither stable nor straightforward, but rather an outcome of continual contestation and response. In doing so, the characterisation of legitimacy here has remained consistent with, and brought detail to, the process-oriented, competitive legitimacy principles that Zumbansen refers to within the context of the TLP model. With this more thorough account of legitimacy in transnational law and regulation, it is now possible to analyse whether the paradoxical characteristics of constitutional (normative) legitimacy arise in the sociological legitimacy principles of transnational regimes.

67 This is not to say that there aren't numerous internal conflicts and contestations among experts and industry representatives in the rule-creation process of ISO.

68 Gunther Teubner, 'After Legal Instrumentalism: Strategic Models of Post-Regulatory Law' in Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (Walter de Gruyter, 1986).

69 For Teubner's description of paradox's 'oscillation' and the productive use of a paradox, see Teubner (n 2) 52.

70 Philippopoulos-Mihalopoulos (n 26); Andreas Philippopoulos-Mihalopoulos, *Absent Environments: Theorising Environmental Law and the City* (Routledge-Cavendish, 2009).

## 5. THE PARADOX OF LEGITIMACY IN TRANSNATIONAL LEGAL PLURALISM

Having described the fundamental legal paradox and the development of transnational legal legitimacy principles, it is now possible to make an analysis from a *critical autopoietic*<sup>71</sup> perspective of the insufficiency of current conceptions of legitimacy, namely due to similar issues of paradoxes. The following critique first addresses the democratising aspects of transnational legitimacy, illustrating that appeals to 'Old-European semantics'<sup>72</sup> of democracy unfortunately do not provide solutions to the problem of founding legitimacy due to the radically fragmented and conflicting rationalities in society. Secondly, it shifts analysis to the proceduralisation aspect of transnational legitimacy, a regime's cognitive openness, to identify the necessary paradoxes that lie behind transnational legitimacy, particularly with reference to the exemplary 'all-affected' principle. Finally, an alternative understanding of legitimacy is suggested, based on a regime's willingness to self-reflect on the exclusionary impacts of its operations, and question whether it has excluded on a sound basis. It is argued that this alternative is more appropriate for the fragmented and differentiated landscape of transnational law.

Before beginning this analysis, it may be helpful to revisit what is at stake in what follows. In his elaboration of a Transnational Legal Pluralism, Zumbansen depicts a transition in thinking about regime legitimacy from constitutional paradox to process-oriented, competing legitimacy principles. The question is to what extent this is a transition, or whether it is a paradox in new clothes. In section 3 it was demonstrated that the constitutional paradox of law arises from drawing a distinction between law and its environment. Furthermore, in section 4 it became apparent that the construction of legitimacy based on democratically inspired input, output and throughput principles is a construction of sociological legitimacy, in which the observer of legitimacy is placed at a distance from a regime, externalised into its environment. Thus, the following analysis is still concerned with the relationship between system and environment, the 'embeddedness' of transnational law, and particularly whether transnational legitimacy principles can account for this relationship in non-paradoxical, or otherwise unproblematic, terms. It will be argued that this is not the case and that the transition in the TLP model is not so much from paradox to legitimacy as a transition *within* the realm of paradox.

71 For an overview of the 'critical systems theory' field, and its focus on the study of paradoxes, see Andreas Fischer-Lescano, 'Critical Systems Theory' (2012) 38 *Philosophy and Social Criticism* 3. Philippopoulos-Mihalopoulos defines a 'critical' autopoiesis as a reorientation towards identity as difference, including the analysis of the repetition of the difference of difference in both system *and* environment, rather than the more conservative view of an exclusive symmetry between system and environment. See Philippopoulos-Mihalopoulos (n 37); Philippopoulos-Mihalopoulos (n 26).

72 See Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Suhrkamp, 1998) pt 5; see also Niklas Luhmann, *Observations on Modernity: The Paradoxes of Differentiation*, William Whobrey (trans) (Stanford University Press, 1998) ch 2.



## A. The Difficulties of Democratising Transnational Law

The description of legitimacy in section 4 noted the importance of democratic concepts in transnational legitimacy principles. Given the different context of transnational law, notions of democracy are reformulated from their traditional nation-state forms to remain relevant at this new level. However, the use of democratic concepts as a solution to the problem of founding a regime's legitimacy must be fundamentally questioned, and critical approaches to systems theory provide an ideal perspective to do this.

In Luhmann's later work, there is considerable skepticism towards the use of what he calls 'Old-European semantics'<sup>73</sup> in modern, or post-modern, societies. Evolving societies can no longer rely, as they did before, on semantics like power, consensus and democracy, since they no longer correspond with the context of radically fragmented and functionally differentiated societies. Instead of fragmentation, these semantics hold 'an illusion of addressing the whole of society'.<sup>74</sup> Luhmann's critique of these semantics is, at its core, a critique of thinking about the relationship between system and environment, or in this context, between regimes and their audiences and regulatory fields. The illusion, and subsequent problems, of an addressable whole in the context of transnational law is visible in debates about the possibility of a global *demos*, either actual or imagined. The controversy as to whether or not one can speak of a global *demos* is precisely a discussion about the problems of representing diverse, fragmented societies as a unity. The difficulty of delineating a public and private sphere at the global level also arises from issues of treating the social environment as a 'whole'. What should be 'public' and what should be 'private' depends on one's position, and amongst our diverse societies there are many possible positions, which each have their own concerns at stake in this distinction.

This is not to say that there isn't any role for democracy in contemporary society. Hans-Georg Moeller's reading of Luhmann describes, in a political context, the limited utility of democratic ideals as a 'symbolic myth',<sup>75</sup> most commonly manifested in the periodic general elections of politicians. Democratic activities become problematic, however, when attempts are made to instrumentalise democratic opportunities, to push for *more democracy*. According to Moeller, this throws out of balance the legitimising capabilities of democracy by flooding the political institutions with too much variation, leading to political, legal and general social instability. According to his reading of systems theory, 'asking too much of democracy' is the biggest threat to the symbolic myth that democracy provides.

Slightly diverging from Moeller's account, this author suggests that the problematic aspect of 'democratising' initiatives is, instead, the rather naïve assumption that 'more democracy' won't require further selection, and thus further antagonism. Expanding participation of conflicting societal perspectives in transnational rule-making and

<sup>73</sup> *Ibid.*

<sup>74</sup> Philippopoulos-Mihalopoulos (n 26) 187.

<sup>75</sup> Hans-Georg Moeller, *The Radical Luhmann* (Columbia University Press, 2011) 98–104.



rule-enforcement can only be a solution to building a legitimate regime or order if this expansion is able to result in a better functioning regime. Selection is required to deal with these conflicts or a regime would be paralysed. That is the consequence of a societal environment that is marked not by its unity but rather by its differences. Thus, a concept of legitimacy that urges for 'more democracy' misses the target. The legitimacy of a regime, and its ability to function, is dependent on *how* it deals with its complex, conflicting environment, that is, on its selections and how and why they are made.

Previous attempts to push for greater democratisation of transnational regimes have faced precisely these issues of increased variation. The instability that arises from greater participatory rights on a (nearly) global scale has crippled legal initiatives in the past, particularly in the field of international environmental law. But the crippling effect arises precisely because of the re-introduction of conflict, of difference, that comes with extensive calls for 'more democracy'. In systems terminology this reflects the lack of unity within the system's internalised environment in which it searches for a single voice of the plural *demos*. In effect, this crippling pits the democratic nature of input and throughput against any possible output legitimacy. Instead of falling prey to the paralysis of calls for more democracy, many transnational legal regimes have been successful because they are isolated from demands for instrumental democracy, as was the case with the FSC, arising in the wake of the failed 1992 Earth Summit in Rio de Janeiro. The fragmented and conflicting positions regarding the worldwide problem of illegal timber harvesting had proved too problematic at the Earth Summit, resulting in a failed attempt at bringing about an international convention on forestry.

While it is only to be expected that democratic demands continue to be made on transnational regimes, it cannot be expected that stable constructions of legitimacy will result from naïve calls for more democracy without the acknowledgment that this will introduce a problematic complexity of differences into the situation, differences of expert opinion, differences of economic interests, cultural differences, etc. The destabilising nature of democratisation must be recognised and not ignored. Next, the 'selection' of this dilemma, found in the procedural aspects of legitimacy, is examined more closely to locate the paradoxical nature of transnational legitimacy principles.

## B. Procedural Legitimacy in Transnational Law

As noted above, the elements of input, output and throughput legitimacy are characterised by both their calls for democracy and their focus on proceduralisation.<sup>76</sup> Their procedural qualities are connected to the previous analysis of democracy in that they are the concepts which demonstrate the need for selection that comes with greater democratic participation in transnational regulation. Jiří Příbáň has observed the transition of

<sup>76</sup> This distinction comes from Jiří Příbáň, 'Legitimacy between the Noise of Politics and the Order of Law: A Critique of Autopoietic Rationality' in Jiří Příbáň and David Nelken (eds), *Law's New Boundaries: The Consequences of Legal Autopoiesis* (Ashgate, 2001) 104.

legal legitimacy from values and principles toward proceduralisation as a result of law's further differentiation in society, which in turn results in a focus on the process of legitimisation, with legitimacy being the result.<sup>77</sup> In his view, the process of legal legitimisation consists of the various self-reflective learning mechanisms that facilitate the implementation of legal norms.<sup>78</sup> While the procedures of legitimisation are internal system mechanisms, without cognitive observation of the system's environment to establish the normalcy that results from legal norms, legitimacy would remain unattainable. Therefore, the process of legitimisation/legitimacy also concerns the relationship between law and society, previously noted as law's 'embeddedness', or 'cognitive openness'.

By framing the procedural legitimisation of transnational legal regimes in regards to their cognitive openness, problems begin to arise. Příbáň describes legitimacy as being constructed in simultaneously evolving, self-referential (and therefore 'closed') procedures and increasing cognitive sensitivity (openness) to the reception and effects of a regime's norms.<sup>79</sup> The demands of legitimacy are then for regimes to become both more closed and open, albeit in different ways—hence the famous description of law as 'cognitively open and normatively closed'. For instance, the 'all-affected' principle, the paramount aspect of input legitimacy, is the self-referential principle that reminds regimes of the necessity to remain cognitively open to the interests and voices affected by their actions. The principle is not purely opening, because the incorporation of the interests of the all-affected can only be meaningful in the regime's own terms, at the designated times, and with accordance to further procedures, which is the consequence of its normative closure. In this sense it retains the spirit of the aforementioned dilemma in democracy that greater participation cannot result in substantial increases in variation without either leading to further selection or becoming destabilising—the input of external interests are procedurally selected, and thus made more redundant. For a regime, the difficulty is walking the tightrope of incorporating the views and opinions of the affected, while minimising the changes and challenges they could bring. To do so, their views are selected, acknowledged and internalised in a 'closed' manner.<sup>80</sup>

77 'We may therefore sum up by saying that *legitimacy* is a contingent outcome of the legal definition of a particular social strategy. *Legitimation* is a permanent struggle to obtain this outcome, which does not initially have a legal form and represents what has not been defined, conceptualised and enforced by law, yet.' *Ibid*, 116–17.

78 *Ibid*, 108–14; In reference to Luhmann, Příbáň maintains that the legitimacy of law is measured in the success of its communications, thus in the ability for legal communications to be understood and accepted as binding legal norms.

79 Note the similarities between this account and Julia Black's account of legitimacy and accountability.

80 Philippopoulos-Mihalopoulos describes this phenomenon similarly, drawing a parallel between the normative/sociological legitimacy distinction and the legitimisation/legitimacy distinction used by Příbáň. Sociological legitimacy is then considered to be external, and thus connected to the cognitive openness of a system. For Philippopoulos-Mihalopoulos, this results in the placement of the environment within the system (a re-entry of both sides of the distinction in each other). The system then re-establishes its environment by self-reference, 'ignoring the externality of the internal'. Andreas Philippopoulos-Mihalopoulos, 'Moment of Stasis: The Successful Failure of a Constitution for Europe' (2009) 15 *European Law Journal* 309, 316–17.

In order to deal with demands of greater cognitive openness, regimes must make a distinction, a selection, between relevant and non-relevant<sup>81</sup> interests, or alternatively the 'affected' and the non-affected. In regards to expertise, this can be reformulated as the distinction between pertinent and non-pertinent experts. Regarding throughput legitimacy, the distinction emerges in the difference between necessary procedural opportunities and unnecessary ones. In any case, what is necessary is a demarcation as to what the regime is willing to accept as its field of regulation in which it 'embeds' itself, that is, the voices it is willing to register as relevant. This necessity arises out of the increasing complexity of issues faced by transnational legal regimes. Whether financial, environmental, energy-related, or otherwise, it has become increasingly difficult to separate societal issues or problems. For example, de-forestation is no longer a single issue about land preservation; it is also related to global warming, carbon emissions, water quality, erosion, biodiversity, economic performance of natural resource industries, and indigenous rights. For this reason, regimes must delineate their own systemic 'environment' by creating a unity out of their larger, chaotic, fragmented and disorderly environments, and in doing so establish the extent to which they will allow themselves to become concerned with the complexity of the issues they regulate. This also entails, of course, the extent to which the effects of their activities can be registered by the 'all-affected'.

The delineation of relevant and non-relevant can only be made asymmetrically, however, and this is the crux of the problem and the location of the fundamental transnational legal paradox. Only regimes can make this distinction, and only from the side of relevance. The incorporation of opinions, interests and experts is allowed by regimes themselves, and those left on the other side of the distinction do not register, despite how relevant the distinction itself might be for them from their perspectives. As stated, this is necessary for decreasing the scope of cognition for the regimes, for decreasing the exposure of their 'embeddedness'. Yet, it also results in a pre-emptive determination of the 'all-affected' on the regime's own terms. The narratives of global climate change provide audiences worldwide with the scientific justifications for their affectedness in even the smallest scale activities, but by preemptively delineating the realm of acceptable 'all-affected' interests, regimes can make their environments more manageable. A similar situation faces the involvement of experts. The asymmetry of the distinction, combined with the incompatibility of accepting it as asymmetrical, results in the paradox that the allegedly 'non-affected' are affected through their non-affectedness, their status of being designated as non-affected.<sup>82</sup> The illogical circumstance that the 'all-affected' interests

81 Note that 'non-relevant' is purposely used in this situation instead of 'irrelevant'. The latter would be the result of judging an interest that could also potentially arise as relevant, whereas non-relevant is left at a more radical distance. A non-relevant position cannot acknowledge something as either relevant or irrelevant, it doesn't register it at all.

82 This paradox is similar to the paradox of 'justifying justifications' that Luhmann mentions. See Luhmann, *Observations on Modernity* (n 72) ch 5 'The Ecology of Ignorance'.

are actually only some of the affected explicitly undermines the intention of the principle. It is in this sense that the new approaches to legitimacy in transnational law face the similar problems of attempting to address an inaccessible 'whole', as was the case with the 'Old-European semantics' of consensus, democracy, etc.<sup>83</sup> Both orientations towards legitimacy encounter the pitfalls of trying to make a unity out of their fractured, diverse environments by using principles which must result further in selection. Despite this turn towards proceduralisation, there is still a very problematic difficulty—a paradox—in establishing a foundation on which to build an understanding of legitimacy for transnational legal regimes.

If we recall the early description of paradox in this article, we are reminded that paradoxes develop out of the distinction, and thus also the relationship, between system and environment, between law and its violent, a-legal origins. Law's foundational paradox, in those accounts, comes from its social origins, and the simultaneous inability to explain its non-legal origins. It is seen as the ever-problematic nature of accounting for the distinction between law and its society. Now, in the context of transnational legitimacy, we see that the paradox arises again in the relationship between system and environment, or regime and audience. More particularly, it is seen in the regime's need to identify a unity in its fragmented and chaotic environment, but then suggesting that the environment itself is a unity. Continuing with the example of the 'all-affected' principle, the regime suggests that it can accommodate and involve the conflicting social realities affected, and in doing so implicitly excludes those it cannot handle. When asked how it determines who is affected, the regime points to its environment while it should be pointing to itself—ultimately, it can only point to itself.

One might contend, in response to the exposure of this paradoxical problem, that regimes could conceivably be open to all the affected without this pre-emptive closure, by allowing for the affected to identify themselves. This is, in essence, what the principles promise to do. However, the problem exists at a more fundamental level than this. The problematic nature of this paradox arises when a regime cannot understand the claim of an allegedly affected party which appears to the regimes as non-sense. This kind of non-sense claim arises, for example, when novel connections between actions and interests are raised for the first time, in a relationship that is unknown. It would not be difficult to imagine the reaction that one would receive if they noted the relationship between deforestation and climate change, not only as a scientific relationship, but as a reason why communities at risk of climate change-related ecological changes should be involved in forestry policies in societies across the globe. In this sense, it's not so much about the ability of affected parties to identify themselves, but more fundamentally about the assumptions concerning what constitutes the difference between an argument that makes sense and one which is non-sense.

<sup>83</sup> Philippopoulos-Mihalopoulos (n 26) 187.

The consequences of this asymmetrical distinction in the principles of transnational legal legitimacy provide a preliminary answer to Zumbansen's core question in the TLP paradigm: 'what is at stake?' More thoroughly, the question points to the need to identify the significance, or importance, of regulating social activities with transnational laws, norms and standards rather than in the venue of nation-state legal and political systems, or other normative institutions. In other words, the question is directed at identifying the stakes involved in choosing one regulatory path over another. The present analysis, then, illustrates that a radical exclusion is a necessary characteristic of transnational legal legitimacy in its current form. Despite demands for greater sensitivity to the consequences of their actions, and even because of these demands, transnational regimes must preemptively establish the cognitive boundaries that define their area of influence, their systemic horizons. In effect, this boundary construction pulls out the rug from under the feet of those who have been radically excluded, those whose position embodies the paradox of legitimacy in transnational regimes in that their status of non-affectedness affects them. What seems to be at stake in the rise of transnational law is a change in how the limits of discussion and debate are set. Relevant positions are no longer solely characterised by territory and category—citizens of a particular state—but are determined by regimes based on evolving criteria in order to create a meaningful understanding of the complexities they attempt to regulate. This comes with the potential threat that the boundaries regimes set for themselves, the self-delineated extremes of their cognitive openness, are insufficient, that they perpetuate ecological, financial, economic or generally social instability. The uncertainty of whether this is a real threat suggests that perhaps legitimacy should be understood otherwise, in a manner that addresses the possibility that the pre-emptive self-delineation of a regime's boundaries of affecting can be insufficient for providing stability, whether it be economic, political, environmental, etc.

### **C. Legitimacy and the 'Absent Environments'**

Moving forward from the author's critique of proceduralised and democratised transnational legitimacy, Philippopoulos-Mihalopoulos offers a possible new direction in thinking about legitimacy in this context. In his critical interpretation of Luhmann, Philippopoulos-Mihalopoulos develops the concept of 'absent environments', not simply the external reference to a system's environment, but 'a reference to the absence of reference'.<sup>84</sup> Unlike the expansion of cognitive openness that current conceptualisations of transnational legal legitimacy demand, the reference to absent environments requires a regime to question itself, and thus also its boundaries and limitations—the delineated extremes of its (internalised) environments. Importantly, these 'absent environments' are plural, signaling the degree of disorder, antagonism, conflicting societal rationalities and competing positions that can be found in law's environments. More importantly, the

<sup>84</sup> *Ibid.*, 192.

absence is not of one of these environments, but the absence of the plurality of them. In one sense it is the absence of *differences* that Philippopoulos-Mihalopoulos is describing.

Building an understanding of legitimacy on the notion of absent environments would entail a reoccurring self-questioning about the boundaries that regimes place around their activities. Instead of constructing legitimacy images on the basis of widespread, yet always exclusive, participatory opportunities, legitimate regimes would instead need to reflect on why these opportunities have been reserved for the particular group, and not different, absent ones. This would entail reflecting on the nature of the activities that the regime seeks to regulate, a constant self-questioning that maybe it hasn't gotten it right. It would situate the conceptualisation of legitimacy on the boundary between law and non-law, or more precisely it would require a self-questioning of the foundations of this boundary. In this sense, this suggestion hardly evades using a paradox as foundation; that is not the intention. Instead, it would require awareness of the effects of a system's paradoxical boundary, taking note of the absence of the environments in the system, and questioning that absence self-reflectively. 'The environment must remain absent within. But its absence should be sought.'<sup>85</sup> The 'seeking' is the activity on which legitimacy should be based, and not the 'seeking' of more voices, but of their absence.

Fortunately, by defining legitimacy on the basis of the self-reflection that is required in this concept of 'absent environments', regimes would not be pressed into the uneasy dilemmas of the current understandings of legitimacy. On the one hand, a reference to the absence of environmental reference goes short of demanding an ever-increasing, paralysing, cognitive openness. This is not a demand that regimes attempt to include as much of their environmental diversity as possible. Rather, it is a suggestion that a legitimate regime is one which reflects on its inability to do so, and the consequences of that inability. This self-reflection is a practice of continually revisiting the disorderly, complex environment at its core to ask itself whether it has characterised its activities insufficiently, mistakenly excluded relevant interests, or, even worse, included those that are distracting. And thus, on the other hand, this understanding of legitimacy requires regimes to reflect on and appreciate the fractures and diversity among their absent environments. Unlike the pushes for democratisation of transnational regimes, this approach recognises the inadequacy of viewing a regime's environments as a unity by suggesting the expansive inclusion of all positions. Instead, it requires regimes to reflect on the basis for exclusion that they have utilised, to revisit the selection criteria with the knowledge that they will not be perfect. One might argue that this, too, is a paralysing form of legitimacy for regimes, requiring continual reflection and adjustment of fundamental boundary decisions. In a sense it is paralysing, but in a productive sense, as it gives regimes the space and time necessary to reconsider the elementary aspects of its regulatory field, the aspects which repeatedly seem to be taken for granted, with the consequences being devastating.

<sup>85</sup> *Ibid*, 193.

## 6. CONCLUSION

This article began by questioning the understanding of legitimacy in Zumbansen's innovative Transnational Legal Pluralism. The model was correct in situating legitimacy in the previous position of constitutional paradoxes, mitigating the relationship between law and its environment. On the other hand, the paradoxical, and problematic, understanding of transnational legitimacy was somewhat underdeveloped. That has been the goal of the current analysis, to bring detail to the character of legitimacy in the transnational legal context and place it in juxtaposition with constitutional paradoxes. By doing so, the paradoxical nature of transnational legitimacy in its current form has been revealed. The result is a situation in which regimes are faced with the paralysis of democratisation on the one hand, and the unstable and paradoxical foundations of procedural principles on the other. Given this situation, transnational regimes preemptively delineate their asymmetrical boundaries, establishing what is and is not relevant to their activities. The uncertainty of their foundations becomes the most substantial problem facing transnational regimes. What if transnational legal regimes misunderstand the problems they try to regulate? What if essential expertise is left by the wayside due to shortsightedness? And so the foundational paradox of law's legitimacy lives. Just as the origins of law's authority arise out of a 'non-legal' origin, the legitimacy of transnational law is likewise a-legitimate. The paradox of law is impossible to completely resolve, but is nonetheless necessary as the foundation on which to speak of law and its embeddedness in society. For this reason it has been suggested that the legitimacy of transnational legal regimes should be based on their ability to self-reflect on how they draw their boundaries between relevant and irrelevant interests. Through their 'absent environments', legal regimes are able to question their own understandings of their embeddedness in society, and avoid the pitfalls of proceduralisation and democratisation.